IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 596

UNITED STATES OF AMERICA,
Petitioner,
vs.
WALTER KORPAN,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

ROBERT A. SPRECHER,
100 West Monroe Street,
Chicago 3, Illinois,
Attorney for Respondent.

Of Counsel:
SIMON HERR,
111 West Monroe Street,
Chicago 3, Illinois,
FRANK A. KARABA,
100 West Monroe Street,
Chicago 3, Illinois.

THE DUNHOOP-WARREN PRINTING COMPANY, CHICAGO

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STATEMENT.

The respondent, Walter Korpan, respectfully requests that the petition for a writ of certiorari filed by the petitioner in this Court on November 27, 1956, be denied.

The Court of Appeals for the Seventh Circuit, in holding that the use by Congress of the well-known term "so-called 'slot' machine" in a taxing statute did not intend to include the equally well known "pinball machine", was confirmed in its opinion by a lengthy and uniform legislative history.

The petitioner's statement of the question presented is not entirely accurate in that it assumes that the pinball

machine considered by the Court of Appeals is a "gaming device" and that its "operation * * * involves the element of chance" whereas the Court of Appeals specifically stated that "in our view of the case we do not reach this question and voice no opinion thereon" (App. A of Petition, p. 25; see also, p. 24).

The correct question presented is:

> "Whether a pinball machine is subject to the tax imposed by 26 U. S. C. (Supp. III) 4461(2) upon 'so-called "slot" machines' as defined in 26 U. S. C. (Supp. III) 4462(a)(2)."

REASONS FOR DENYING THE WRIT.

1. The petitioner's statement regarding "estimated" loss of revenue is purely speculative. It may more accurately be stated that a conclusion different than that reached by the Court of Appeals would destroy the pinball machine industry and result in loss of revenue for the reason that an amusement game is economically unable to bear the annual $250 tax and the stigma attached thereto whereas the result of the interpretation of the statute announced below will increase Federal revenue through a greater volume of payments of the annual $10 tax. It must be assumed that Congress was exercising its power to tax and not the power to destroy.

This Court has never announced that one of the considerations in granting or denying a writ of certiorari is the volume of "criminal convictions" and "forfeitures" obtained under the prior erroneous interpretation of a statute.

2 (a). The Court of Appeals examined and considered the legislative history of the taxing statute in great detail

and quoted extensively from Congressional committee reports (App. A of Petition, pp. 21-23), which are, as a rule of statutory interpretation, to be given greater weight than the statements of individual Congressmen on the floor of Congress. *United States* v. *St. Paul, Minneapolis & Manitoba Ry. Co.*, 247 U. S. 310 at 318; *Lapina* v. *Williams*, 232 U. S. 78 at 90; *Jefferson* v. *United States*, 178 F. 2d 518 at 520, aff'd. in 340 U. S. 135; *Nicholas* v. *Denver and Rio Grande Western R. Co.*, 195 F. 2d 428 at 431; *Gan Seow Tung* v. *Carusi*, 83 F. Supp. 480 at 481.

However, an examination of debate on the floor of Congress in its full context merely serves to strengthen the result reached by the Court of Appeals. The petitioner quotes a portion of the debate which occurred in the Senate on September 4, 1941 (87 Cong. Rec. 7297; Petition, pp. 8-10). At this time the House of Representatives had passed a bill which would have taxed "so-called 'pinball' and other similar amusement machines" at the same rate as "so-called 'slot' machines" (H. R. 5417, Section 555; H. R. Rep. No. 1040, 77th Cong., 1st Sess., p. 60). The Senate Finance Committee had thereafter recommended that the devices be divided into two categories with a $10 annual tax upon so-called pin-ball or other amusement devices and a $200 annual tax upon so-called slot machines (Sen. Rep. No. 673, 77th Cong., 1st Sess., pp. 21, 75).

On the same day, September 4, 1941, that the language quoted in the petition was uttered, Senator Clark of Missouri and other Senators made other statements which clearly reinforce the opinion of the Court of Appeals. In order to understand some of the references, it is necessary to recognize that the term "slot machine" has two separate and distinct meanings. In one sense, it refers to any machine equipped with a slot for the reception of coins. In this broad sense it includes food and drink vending

machines, cigarette dispensers, pay telephones, turnstiles, parking meters, automatic phonographs and the variety of amusement games found in a penny arcade, none of which are embraced by the term used in the statute. In the advancing age of automation the ordinary citizen has daily contacts with a host of such "slot machines." This meaning is obscure and seldom-used.

The second meaning of the words "slot machine" is a narrow one. It refers specifically to a machine in which the insertion of a coin releases a lever or handle which, in turn, when pulled activates a series of spring-driven drums or reels with various insignia painted thereon, usually bells and fruit. The operator has absolutely no control over the combination in which the insignia cease rotating and such combination determines whether the operator merely loses the coin he inserted or whether he wins additional coins in varying numbers. If coins are won, they are released from the machine and drop into a receptacle where they may be claimed by the operator. Because this type of machine is operated by a single handle and because the odds of the operator winning are so slight, it has been colloquially called a "one-armed bandit." This is the common, ordinary meaning of a "slot machine."

The following statements were made during the Senate debate on September 4, 1941:

> "Mr. Clark of Missouri. * * * But at the same rate the Ways and Means Committee included the so-called one-armed bandits, which are notoriously a racket. I refer to the machines with the lemons, plums, oranges, and what-not, which are notoriously gambling machines. Such machines were put in the same category in the tax bill.
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> "But in the same category were also included the 'one-armed bandits', which have been a racket in every State of the Union except the very few States in which

they have been legalized—in my opinion, to the disgrace of those States.

• • • • •

"Then, Mr. President, I am proud to say that on my motion the tax on the 'one-armed bandits' was increased from $25 to $200." 87 Cong. Rec. 7298.

• • • • •

"Mr. Bailey. • • • The purpose of the amendment is to bring about the prohibition of gambling through the 'one-armed bandits' or to bring an end to robbery through the 'one-armed bandits'." 87 Cong. Rec. 7298.

• • • • •

"Mr. Clark of Missouri. • • • Almost universally in the lowest-income brackets the poorest people send children to the grocery store to buy groceries, and they are attracted by the prospect of return from these—two lemons or two oranges, or two prunes, or whatever they may be." 87 Cong. Rec. 7300.

• • • • •

"Mr. Clark of Missouri. • • • The House provision proposes to raise the same rate of revenue from 'one-armed bandits' as from the little, innocent pinball machines." 87 Cong. Rec. 7300.

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"Mr. Clark of Missouri. • • • I am frank to say that my purpose in offering in the Finance Committee the amendment imposing a tax of $1,000 on slot machines was to make the rate absolutely prohibitive, and put these 'one-armed bandits' out of business." 87 Cong. Rec. 7300.

The pinball machine considered by the Court of Appeals is not a one-armed bandit and it does not have lemons, plums, oranges and prunes.

The separate taxes imposed by Sections 4461-63 are placed on the coin-operated machines themselves, not on the use to which the machine may be put. If two players of a pinball machine decide to gamble on the results of

their play, the machine is not thereby converted into a gambling device. A pinball machine cannot be transformed into something else merely by the award of nominal prizes for the attainment of high scores, or the payment of cash in lieu of additional amusement. The machine remains the same. It is still a device whereby one or more balls are propelled through a chute by the operation of a plunger in the hands of the player, with the ball then registering a score by hitting various bumpers or other objects or by dropping into holes and actuating electrically controlled circuits. The redemption of unused free games by the location owner does not mysteriously transform the machine into one containing insignia on reels or drums. The game of golf also embodies an element of chance and may be made the subject of a wager, but it does not cease to be golf merely because players place nominal bets upon the outcome of a particular game. The pinball machines involved herein could not have been converted into slot machines solely by reason of a wager made by two or more players upon their respective abilities to attain a given score. They could not be so converted by anything done or not done by the proprietor.

If it were possible to convert a pinball game into a "so-called 'slot' machine" through its use, it would be possible to likewise transform any coin-operated amusement game into a slot machine, which not even the Treasury Department has ever contended.

Therefore, there is nothing in the Revenue Act of 1941 or in the committee hearings or reports or in the Senate debate which casts any doubt upon the correctness of the Court of Appeals decision. In fact, all of the pertinent material enforces and strengthens the construction adopted by the Court of Appeals.

(b) In the Revenue Act of 1942, the $10 annual tax on "so-called 'pin-ball' and other similar amusement ma-

chines" was extended to "any amusement or music machine." But the enlargement of the category of machines subject to the $10 tax did not remove pinball games from that classification. In H. R. Rep. No. 2333, 77th Cong., 2d Sess., p. 180, it was stated:

> "Under this amendment there will be included *in addition to pin-ball machines*, a great variety of other machines, such as baseball and football games, machine-gun games, music machines (so-called juke boxes), and many other types of coin-operated games."

(c) The re-enactment by Congress of the language of Section 4462(a)(2), referring to "so-called 'slot' machines," in the Internal Revenue Code of 1954, has no significance inasmuch as the language of the Treasury regulation (Petition, pp. 3-4) was, until recently, never enforced by the Treasury Department itself and, in fact, specific rulings (R. 89-91) and forms (R. 12, 94-5) issued by the Treasury Department followed the construction eventually placed upon the statute by the Court of Appeals. The Court of Appeals said in its opinion that "it is elementary law that a Treasury regulation which is inconsistent with a provision of the Internal Revenue Code has no force and effect" and "only of late has the regulation been followed" (App. A to Petition, p. 26).

3. The Slot Machine (Johnson) Act, 64 Stat. 1134 (1951), 15 U. S. C. 1171-1177, is the only other Federal statute employing the words "so-called 'slot' machine" and that act clearly limits those words to the conventional one-armed bandit "an essential part of which is a drum or reel with insignia thereon." The Johnson Act is merely incidental support of the interpretation of the Court of Appeals which is based primarily upon the language of Section 4462(a)(2) and its legislative history.

Conclusion.

For the reasons stated, it is respectfully requested that the petition for a writ of certiorari be denied.

Respectfully submitted,

ROBERT A. SPRECHER,
100 West Monroe Street,
Chicago 3, Illinois,
Attorney for Respondent.

Of Counsel:

SIMON HERR,
111 West Monroe Street,
Chicago 3, Illinois,

FRANK A. KARABA,
100 West Monroe Street,
Chicago 3, Illinois.

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